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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

BENJAMIN HUSICK,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented by this petition involves the question of what level of abuse of both the procedures and the objectives of the grand jury process must be proven before a district court judge can exercise its supervisory powers over the grand jury and quash a subpoena. Although the district court made clear findings of fact that abuses occurred when it found that petitioner was the victim of a perjury trap in the grand jury, *In Re: Grand Jury Matter (Husick)*, FGJ 93-01 (Ft. Lauderdale) (S.D. Fla. 1994) [*See* Pet. App. at 6], the United States Court of Appeals for the Eleventh Circuit reversed. *In Re: Grand Jury Subpoena (Benjamin Husick)*, 156 F.3d 186 (11th Cir. 1998) [*See* Pet. App. at 1.] The perjury trap doctrine is a question of first impression in this Court.

PARTIES TO PROCEEDINGS

Petitioner (grand jury witness and appellee below):

BENJAMIN HUSICK
represented by Bradley R. Stark, Esq., Law offices of Bradley R. Stark, P.A., 2601 S. Bayshore Drive, Suite 601, Miami, FL 33133

Respondent (appellant below):

UNITED STATES OF AMERICA
represented by Stephen Schlessinger, Esq., Assistant United States Attorney, 99 N.E. 4th Street, Miami, FL 33132-2111 and Brian McCormick and Paul Schwartz, Assistant United States Attorneys in the District Court

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Benjamin Husick, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on August 7, 1998.

CITATION FOR OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eleventh Circuit entered in this case on August 7, 1998 is reproduced in Petitioner's Appendix hereto at Pet. App. at 1. This opinion was not published.

The Order and Opinion of the United States District Court, Southern District of Florida granting the Petitioner's Motion to Quash his grand jury subpoena was entered on July 15, 1997. *See* Pet. App. at 6. This opinion was sealed and is not published. This order was unsealed on November 4, 1998.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is conferred under 28 U.S.C. § 1254(1). The Opinion of the Court of Appeals for the Eleventh Circuit was filed on August 7, 1998. *See* Pet. App. at 1.

CONSTITUTIONAL PROVISIONS

The petitioner alleges that the government deprived him of rights secured by the Fifth Amendment of the Constitution of the United States of America, which states in pertinent part as follows:

> FIFTH AMENDMENT: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . "

STATEMENT OF THE CASE

"The facts of this case are not disputed by the parties." *See* Pet. App. at 6. Petitioner is an eighty-four year old man who suffers from major depressive episodes, takes medication and is under a doctor's care for mental infirmities. He experiences difficulties with memory. *See* Pet. App. at 6, 7, 12.

After a grant of immunity, petitioner was subpoenaed to testify in a grand jury inquiry that, "involved the claim of a debt owed by one of the principals of Palm Springs General Hospital to a third party. This debt had been the subject of years of civil litigation in which voluminous amount [sic] of discovery had been conducted." *See* Pet. App. at 6. The government asserted that instead of a civil debt, as reflected in the civil litigation, the dispute between the litigants was an extortion scheme. *See* Pet. App. at 9. The government does not allege that

petitioner was in any way involved in an extortion scheme, but rather, has knowledge of it. *See* Pet. App. at 11.

Pursuant to the grant of immunity, prior to testifying in the grand jury, two Assistant United States Attorneys interviewed petitioner (in the presence of his counsel) telephonically for approximately one hour, "about the subject matter of the future grand jury appearance." *See* Pet. App. at 7. The following day, immediately before entering the grand jury, a social conversation transpired between the two United States Attorneys, petitioner and his counsel. *See* Pet. App. at 7. At no time either during the telephonic interview or discussion immediately before entering the grand jury did the "Assistant United States Attorneys inform the witness or counsel for the witness that they believed that the witness' statements were 'evasive or untruthful' as later characterized by the government in its pleadings." *See* Pet. App. at 7.

After testifying in the grand jury for one hour, petitioner exited the grand jury and was informed by the Assistant United States Attorneys that he had committed perjury. "For the first time, the government revealed that it had an undercover tape made over four years prior to the grand jury appearance", that the government asserted proved that the petitioner had committed perjury. *See* Pet. App. at 8. Neither during the telephonic interview nor in the conversation proceeding the grand jury appearance – or in the grand jury – was petitioner oriented to the date, location or identity of the taped conversation with the government informant. *See* Pet. App. at 8. This conversation transpired four years prior to the grand jury appearance. *See* Pet. App. at 8. "The government

asked questions of a general nature which it could later claim perjurous because they were contradicted by a specific conversation with a government informant." *See* Pet. App. at 9. The district court found, "that the manner of questioning and the tactics of the government evince an attempt to encourage the witness to give statements which it could later claim were perjurous." *See* Pet. App. at 10.

Petitioner proffered, at a hearing in which petitioner moved to quash the subpoena and the government moved to hold petitioner in contempt, that the tape-recorded conversation by the informant was merely, "puffing to exaggerate the strength of each side to attempt to effectuate a settlement in a civil litigation." *See* Pet. App. at 9. Petitioner was merely acting as a mediator to settle the civil lawsuit. This did not comport with the government's theory of extortion. "The government stated that this explanation was not acceptable and that anything short of recantation of his prior testimony together with testimony to the effect that all of these statements during the attempt to mediate the lawsuit were absolutely true, would result with a charge of perjury."[1] *See* Pet. App. at 9. The government's purpose in trapping petitioner into testimony that it could later claim to be perjurous was to secure, "the witness' cooperation for a future investigation." *See* Pet. App. at 12.

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[1] One of the Assistant United States Attorneys involved in the current case had, at a prior time, indicted petitioner for perjury after making allegedly false statements to another grand jury after a grant of immunity. *See* Pet. App. at 6, footnote 1.

The district court found the tactics of the government were, "an abuse of the grand jury process." *See* Pet. App. at 12. The District Court also found that petitioner was the victim of a "perjury trap" set by the government.[2] *See* Pet. App. at 10, 12.

The United States Court of Appeals for the Eleventh Circuit reversed and remanded. It declined to consider whether the perjury trap doctrine would be recognized in the circuit and noted that, "[c]ircuit courts have discussed, although not adopted, the perjury trap doctrine." *See* Pet. App. at 1. The court held that since petitioner had not been indicted for perjury, the finding of the district court was, "at best, premature" and inapplicable. *See* Pet. App. at 3.

ARGUMENT

THE COURT SHOULD GRANT THE PETITION TO DECIDE AN IMPORTANT ISSUE OF FIRST IMPRESSION – THE PERJURY TRAP DOCTRINE[3] – AN AREA OF THE LAW IN CRITICAL NEED OF JUDICIAL GUIDANCE.

This case presents an issue of first impression before this Court. Accordingly, the Court should grant the Petition and consider joining it with *Conn v. Gabbert*, No. 97-1802. The Court recently granted certiorari in *Conn*, a

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[2] *E.g.*, Gershman, "The Perjury Trap", 192 U.Pa.L.Rev. 624 (1981).

[3] The term "perjury trap doctrine" seems to have first appeared in a law review article. Gershman, "The Perjury Trap", 129 U.Pa.L.Rev. 624, 651-653 (1981).

case that involves allegations of prosecutorial abuse during grand jury proceedings.[4] The Court has the opportunity to clarify an important, yet undeveloped, area of law. This is particularly needed since this area of jurisprudence has not developed with time because so many of the opinions in this area are sealed or unpublished.

While expressly discussed by seven United States Courts of Appeal and numerous treatises, this Court has never considered the perjury trap doctrine.[5] Grand jury

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[4] Most allegations of grand jury abuse involve the due process violation that occurs by abusing the rules or purposes for which the grand jury was designed, and often another right of a witness or a defendant that is being abridged. For example, *Conn v. Gabbert*, No. 97-1802, also appears to involve the Sixth Amendment right to counsel (among other rights) which was alleged to be abridged by denying an attorney access to his client while testifying in the grand jury. In the case of *Neal v. United States*, 103 U.S. 370 (1880), the Equal Protection Clause was also violated by racial discrimination in the selection of jurors for a grand jury. The abridgement of an underlying right does not change the standard of review of a grand jury abuse. All grand jury abuse cases are similar in that each involves a government action, outside the usual grand jury proceedures, that affects an underlying right that belongs to a person who has an interest in the grand jury proceeding. Lower courts need guidance from this Court on how to evaluate grand jury abuses as a genre.

[5] The United States Court of Appeals for the Eighth Circuit in *Brown v. United States*, 245 F.2d 549 (8th Cir. 1957), reversed a conviction for perjury for statements made to the grand jury because of abuses that comport with the perjury trap doctrine. The term "perjury trap doctrine" was coined at a later date. This Court in *United States v. Mandujano*, 425 U.S. 564, 583 (1976), cites *Brown* as an example of grand jury abuse.

matters are of particular concern to the judiciary. "The Grand Jury is an arm of the court and its in camera proceedings constitute 'a judicial inquiry'. *Hale v. Henkel*, 201 U.S. 43 (1906). The Constitution itself makes the grand jury part of the judicial process. *Cobbledick v. United States*, 309 U.S. 323, 327 (1940)." *Levine v. United States*, 362 U.S. 610, 617 (1960).

There are three elements to a perjury trap, as the district court noted in the case before the Court. *See* Pet. App. at 11. "The first element of a perjury trap is when a prosecutor has collected substantial proof of the activity that will be the subject of questioning prior to requiring the witness' attendance at the grand jury." *See* Pet. App. at 11. "The second element requires that there is no other manner in which to secure an indictment of the witness." *See* Pet. App. at 11. In the case before the Court, the government did not want to indict petitioner; it wanted the threat of indictment so as to force him into becoming an informant. *See* Pet. App. at 12.The third element of a perjury trap, "involves unusual tactics by the prosecutors." *See* Pet. App. at 11. In the case before the Court, the district court found that all of these elements were proven. The district court found that the purpose of

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No court has ever rejected the perjury trap doctrine, but rather, has distinguished particular abuses of the grand jury process from the doctrine. Twenty-three law review articles and seven United States Courts of Appeal refer to the "perjury trap doctrine". The United States Court of Appeals for the Eleventh Circuit, in the case before the Court, notes that, "[c]ircuit courts have discussed, although not adopted, the perjury trap doctrine." *See* Pet. App. at 1.

ensnaring the petitioner in a perjury trap was to turn him into a government informant. *See* Pet. App. at 12.

Factually, the hallmarks of a classic perjury trap are present in the case before the Court. The government extensively questioned the witness about a prior conversation, one that occurred four years earlier, which had been tape-recorded by a government informant. It is this taped conversation that is the basis of the government's allegations of perjury. Although the overall objectives of the investigation may be proper, as the circuit court found, questioning petitioner about a four-year-old tape-recorded conversation with a government informant can serve no purpose other than to trap the petitioner into perjury. *See* Pet. App. at 11.[6] The district court further found that petitioner was not oriented towards the time, place and nature of the conversation in question. *See* Pet. App. at 8. This failure was exacerbated by petitioner's history of mental infirmities. *See* Pet. App. at 12.

This Court has infrequently addressed abuses of the grand jury system. For purposes of brevity, the cases decided by this Court can be interpreted as falling into two categories: those that are more procedural in nature, as compared to those that involve improper objectives or purposes of the government. Cases that resonate in a violation of grand jury procedures, but do not involve improper objectives of the government, tend to hold that no error occurred. *E.g., United States v. Mechanik,* 475 U.S. 66 (1986) (harmless error doctrine applies to grand jury

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[6] This is a classic indicia of a perjury trap described, with a transcript as an example, by Gershman, "The Perjury Trap", 129 U.Pa.L.Rev. 624, 651-653.

proceedings); *Sullivan v. United States*, 347 U.S. 1010 (1954) (indictment not faulty because attorney presented evidence to grand jury without authorization of Attorney General's office); *In re Moran*, 203 U.S. 96 (1906) (disobeying the law governing manner of selection of grand jurors does not affect jurisdiction of court); *Reynolds v. United States*, 98 U.S. 145 (1878) (indictment valid despite lesser number of grand jurors then required by statute). This Court has decided cases regarding the scope of permissible disclosure of grand jury matters, *United States v. Baggot*, 463 U.S. 476 (1983), as well as the scope of grants of immunity to testify before grand juries. *Piemonte v. United States*, 367 U.S. 556 (1961). *See also Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 292 U.S. 280 (1968) (witness cannot be forced to waive immunity). The government's failure to present exculpatory evidence to the grand jury does not invalidate an indictment. *United States v. Williams*, 504 U.S. 36 (1992).

Regarding claims of improper government objectives in the use of grand juries, this Court has been more inclined to find harmful error. This court has found error with grand juries that exclude jurors because of race or color. *Campbell v. Louisiana*, 118 S.Ct. 1419 (1998); *Cassell v. State of Texas*, 339 U.S. 282 (1950); *Akins v. State of Texas*, 324 U.S. 836 (1945); *Neal v. Delaware*, 103 U.S. 370 (1880). Similarly this Court has held in *New Jersey v. Portish*, 440 U.S. 450 (1979), that a defendant's testimony before a grand jury, under a grant of immunity, cannot constitutionally be used to impeach him during his later criminal trial. This Court has indicated that, perhaps under appropriate circumstances, a due process violation can arise from an abuse of the grand jury process. *Mandujano*, 425

U.S. 564. It is worthy to note that *Mandujano* cites *Brown*, 245 F.2d 549, as such an example. *Id.* at 583. The facts of *Brown* resonate in a classic perjury trap. Similarly, regarding improper objectives of the government, although a witness cannot refuse to testify about evidence on the ground that it is obtained by illegal search and seizure, *United States v. Colandra*, 414 U.S. 338 (1974), a witness can preclude the use of evidence derived from unlawful intercept of wire or oral communications in a grand jury contempt proceeding. *Gelbard v. United States*, 408 U.S. 41 (1972). This Court also held that under some circumstances a witness before a grand jury can not be held in contempt for obstructing a grand jury inquiry by giving false testimony to a grand jury. *In re Michael*, 326 U.S. 224 (1945). These cases tend to focus on the purpose or objective of the government rather than the particular procedure that was not followed in the grand jury process.

The grand jury process is a delicate juncture where the substantial powers of the executive branch of government, exercised in secrecy, are held accountable only by the supervisory role of the judiciary and grand jurors who represent the interest of other citizens.[7] Because it is shrouded in secrecy, and the grand jury is "an arm of the court", the judiciary has a heightened responsibility to

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[7] The district court impanels the grand jury, confers immunity upon witnesses, enforces subpoenas, punishes for contempt and generally exerts its supervisory powers as a bulwark against potential abuses. *E.g.*, 18 U.S.C.A. § 216.

safeguard the integrity of grand jury processes. *Levine*, 362 U.S. 610, 617.[8]

The grand jury process does not receive the benefits that flow from the public disclosure of advocacy between parties before a neutral magistrate.

The line of cases that discuss abuses of the grand jury in the lower courts are difficult to interpret in a coherent fashion. Review of these cases teaches that, while some conduct appears to be outrageous and yet is tolerated, other conduct that appears less egregious is sometimes not tolerated.

The line of cases discussing abuses of the grand jury process, including the perjury trap doctrine, are more easily understood when they are divided into two categories: the abuses of grand jury methods or rules of procedure and the objective or purpose that the government action seeks to serve by committing the abuse.[9] Thus, a relatively egregious violation of the court's grand jury procedures will be tolerated if the government's objective in the abuse is not so egregious. *E.g., United States v. Brown*, 49 F.3d 1162 (6th Cir. 1995) (government withheld evidence from defendant prior to his testimony before the grand jury and later indicted him for conspiracy to violate civil rights by a drive-by shooting into a Synagogue, perjury charge was incidental lesser charge); *United States*

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[8] This Court noted in *Ex Parte Bain*, 121 U.S. 1, (1887), that the grand jury is also "a means of protecting the citizen against unfounded accusation." *Id.* at 21.

[9] Gershman proposes a test akin to this paradigm to determine the existence of perjury traps. Gershman, "The Perjury Trap", 129 U.Pa.L.Rev. 624 (1981).

v. Chen, 933 F.2d 793 (9th Cir. 1991) (perjury indictment for grand jury testimony incidental to more serious crimes for which witness was indicted); *United States v. Martino*, 825 F.2d 754 (3d Cir. 1987) (no perjury trap existed since purpose of bogus grand jury subpoena was not to induce perjured statements); *United States v. Vesich*, 724 F.2d 451 (5th Cir. 1984) (defendant testified to grand jury and was indicted for more serious crimes of obstruction of justice and bribery of a state judge, perjury indictment incidental to more serious charges).

Conversely, when the primary objective or purpose of the governmental abuse is improper, the methods of abuse come under greater scrutiny. *E.g.*, *Brown*, 245 F.2d 549 (purpose of grand jury subpoena was to secure indictment for perjury). *See also Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972) (repetitive questioning of grand jury witness was held improper when used to coax witness into commission of perjury or contempt). In *Bursey*, the Court held that questioning designed to "coax a witness into the commission of perjury" is an "abuse of the grand jury process." *Id.* at 1082.

In summary, the reasons for granting the petition are substantial. First, the case before the Court provides a clear fact pattern from which to address the issue of a "perjury trap". As the district court noted in its order, "[t]he facts in this case are not disputed by the parties." *See* Pet. App. at 6.

Secondly, this Court recently granted certiorari in the case of *Conn*, No. 97-1802, another case involving improprieties related to the grand jury. Granting the petition in the case before the Court, and perhaps joining it with

Conn, gives this Court a better opportunity to enunciate a standard of law. This clarification is particularly needed because precedent is slow to develop because many opinions are sealed or unpublished. Grand jury issues are of particular interest to the judiciary since the grand jury is an "arm of the court". *Levine*, 362 U.S. 610, 617 (1960).

Finally, the case before the Court is one of first impression and is ripe for consideration.

CONCLUSION

For the foregoing reasons, the petitioner urges this Court to grant this petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

DATED: November 5, 1998

Respectfully submitted,

BRADLEY R. STARK
Counsel of Record
Attorney for Petitioner

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-5586

D. C. Docket No. FGJ 93-01

IN RE: GRAND JURY SUBPOENA (BENJAMIN HUSICK)

UNITED STATES OF AMERICA,

Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(August 7, 1998)

Before HATCHETT, Chief Judge, BLACK, Circuit Judge, and KRAVITCH, Senior Circuit Judge.

PER CURIAM:

The Government appeals from the district court order quashing the federal grand jury subpoena ad testificandum issued to Benjamin Husick. The district court quashed the subpoena on the basis of the so-called "perjury trap" doctrine. We decline to consider whether such a doctrine should be recognized in this Circuit but hold that the district court erred by quashing this subpoena. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

Circuit courts have discussed, although not adopted, the perjury trap doctrine. *See, e.g., United States v. Chen,*

933 F.2d 793, 796-97 (9th Cir. 1991); *United States v. Regan*, 103 F.3d 1072, 1079 (2d Cir. 1997). Of the cases that have discussed the doctrine, many contain a common theme: "When testimony is elicited before a grand jury that is attempting to obtain useful information in furtherance of its investigation, or conducting a legitimate investigation into crimes which had in fact taken place within its jurisdiction, the perjury trap doctrine is, by definition, inapplicable." *Chen*, 933 F.2d at 797 (internal quotations and citations omitted) (cited with approval by *United States v. Swindall*, 971 F.2d 1531, 1556 (11th Cir. 1992)). *See also, United States v. Brown*, 49 F.3d 1162, 1168 (6th Cir. 1995) (citing *Chen* and stating the same proposition); *Regan*, 103 F.3d at 1079 ("We have noted that the existence of a legitimate basis for an investigation and for particular questions answered falsely precludes any application of the perjury trap doctrine." (internal quotations and citations omitted)). Despite the recognized importance of this principle in the authority cited by the district court, the district court did not consider this element before quashing the subpoena.

The issuance of the subpoena ad testificandum in this case was an attempt to obtain useful and material information in a continuing legitimate investigation. Although we expressly decline to consider the propriety of the perjury trap doctrine, we conclude that such a doctrine, if it exists, is not applicable here because the grand jury is conducting a legitimate investigation and, through this subpoena, is seeking information material to that investigation.

Furthermore, assuming the existence of the perjury trap doctrine, the district court acted prematurely in

quashing the subpoena. Generally, cases addressing the doctrine deal with (1) motions to dismiss indictments for perjury, *see e.g., Regan*, 103 F.3d 1072, (2) challenges to a perjury conviction, *see, e.g., Chen*, 933 F.2d 793; *Brown*, 49 F.3d 1162, or (3) motions to set aside a finding of contempt for failure to testify before the grand jury, *see, e.g., In re Grand Jury Proceedings*, 1989 WL 123627 (9th Cir. 1989) (unpublished disposition). This case presents very different facts. The allegedly false testimony has already been given and the Government has not sought an indictment for perjury. The Government has, in fact, affirmatively represented that it will not seek such an indictment. Furthermore, the Government does not seek to trap the witness into presenting false testimony in the future but instead wants Husick to correct the alleged perjured testimony that he has already given. There is currently no harm in this case against which the perjury trap doctrine was designed to protect. The district court's action was, at best, premature.

For the reasons stated above, we reverse the district court order quashing the subpoena ad testificandum and remand for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

No. 97-5586

District Court Docket No. FGJ-01

IN RE: GRAND JURY SUBPOENA (BENJAMIN HUSICK)

UNITED STATES OF AMERICA,

Appellant.

Appeal from the United States District Court
for the Southern District of Florida

Before HATCHETT, Chief Judge, BLACK, Circuit Judge, and KRAVITCH, Senior Circuit Judge.

JUDGEMENT

(Filed Aug. 7, 1998)

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the District Court appealed from in this cause be and the same is hereby **REVERSED**; and that this cause be and the same is hereby **REMANDED** to said District

Court for further proceedings in accordance with the opinion of this court.

Entered: August 7, 1998
For the Court: Thomas K. Kahn, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: AUG 07 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

GRAND JURY SUBPOENA	
IN RE: GRAND JURY SUBPOENA ISSUED TO BENJAMIN HUSICK	CASE NO. ~~95-01-GONZALEZ and~~ FGJ 93-01 (FT. LAUDERDALE)

ORDER

(Filed July 16, 1997)

THIS CAUSE has come before the Court upon Benjamin Husick's Motion to Quash Grand Jury Subpoena.

The facts in this case are not disputed by the parties. Witness, Mr. Benjamin Husick ("Witness"), age 84, was granted immunity by this court on February 10, 1995, and subpoenaed to testify before a federal grand jury 93-1 (FL) on April 28, 1995. Mr. Husick was to be questioned regarding activities related to Palm Springs General Hospital in Hialeah, Florida. The subject matter of the grand jury inquiry involved the claim of a debt owed by one of the principals of Palm Springs General Hospital to a third party. This debt had been the subject of years of civil litigation in which voluminous amount [sic] of discovery had been conducted.

Upon the request of the government, with his attorney Bradley R. Stark, Esq. present, the Witness spoke telephonically with the Assistant U.S. attorney Brian McCormick and Kevin March (Middle District of Florida)

about the subject matter of the future grand jury appearance.[1] Prior to this interview counsel for the Witness had faxed to the government two letters from treating physicians who stated that the Witness in the last year had suffered from a major depressive episode months before the subpoena, was taking medication for mental infirmities and had difficulty with his memory. In turn, the Assistant United States attorneys also faxed a letter that the statements made in this interview prior to the grand jury appearance would also be viewed by the government as immunized.

Messrs. McCormick and March questioned Husick for approximately one hour. At no time during this interview did the Assistant United States attorneys inform the Witness or counsel for the Witness that they believed that the Witness's statements were "evasive and/or untruthful," as later characterized by the government in its pleadings. Government's Motion for Show Cause Hearing and Response in Opposition to Motion to Quash Grand Jury Subpoena at 3.

The following day the Witness appeared before the grand jury. After social conversation between the parties, the Witness was called into the grand jury and testified for approximately one hour. During his grand jury testimony the witness told the grand jury that he had trouble remembering dates and events and that he was under a doctor's care for mental infirmities and was required to

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[1] Mr. Kevin March had a time prior to this grand jury, indicted the Witness for perjury because of false statements made to another grand jury after a grant of immunity. Ultimately this indictment for perjury was dismissed.

take medication for these infirmities. After testifying for approximately one hour, the Witness asked to speak to his attorney, who was waiting outside the grand jury room.

Upon exiting the grand jury room, the Assistant United States attorney informed the Witness and his counsel that the Witness had committed perjury. For the first time, the government revealed that it had an undercover tape made over four years prior to the grand jury appearance, which the government claimed proved that the Witness was committing perjury.

The government's questioning both during the pre-grand jury interview and in the grand jury "specifically"[2] involved a conversation the Witness had with a government informant over *four years ago*.[3] At no time during the interview the night before the grand jury appearance, during the social conversation immediately prior to the grand jury appearance, or during the grand jury questioning, did the government orient the Witness to the date, location, or identity of the other person involved in the conversation that was recorded by the government and was the basis for their questions. The government never once told the Witness that they were inquiring

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[2] Government's Motion for Show Cause Hearing and Response in Opposition to Motion to Quash Grand Jury Subpoena at page 4.

[3] Prior to this hearing, the Witness mad [sic] several requests for the government to provide copies of the grand jury testimony and the tape for purposes of comparison. The government continually refuses to provide this information for the hearing before this court.

about a specific single conversation, that it took place in Tampa over four years ago, never identified the person involved in the conversation or took any steps to orient the Witness as to the specific conversation that was the focus of its questions during two separate occasions totaling two hours of questioning. Instead, the government asked questions of a general nature which it could later claim perjurious because they were contradicted by a specific conversation with the government informant.

The government, at the request of Counsel for the Witness, played the undercover tape for the Witness and at different times stopped the tape and identified statements that proved the Witness had committed perjury during his grand jury testimony.

Defense counsel proffered that the Witness' memory of this conversation was impaired but that now having been oriented to the date, location and person involved in the conversation, could proffer that he was merely attempting to act as a mediator between the two parties and settle the lawsuit. To this end he engaged in puffing to exaggerate the strength of each side to attempt to effectuate a settlement in the civil litigation. At the hearing, counsel for the Witness proffered that the government stated that this explanation was not acceptable and that anything short of recantation of his prior testimony together with testimony to the effect that all of these statements during the attempt to mediate the lawsuit were absolutely true, would result in a charge of perjury.[4]

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[4] Assistant United States attorneys Brian McCormick or Kevin March did not appear at the hearing although McCormick

Mr. McCormick did not attend the hearing and the government did not contradict this proffer except to argue that the first time the government heard about this attempt to mediate the lawsuit was during this hearing although the Witness' Motion to Quash the Grand Jury Subpoena clearly argues that these statements were an attempt to mediate between parties in civil litigation.

At no time, during the interview prior to the grand jury, immediately before the grand jury, or during the grand jury testimony, did the government orient the Witness to the approximate year, time and participants of the conversation of which they were inquiring. It is axiomatic in any court proceeding that a witness must be oriented to the time, place and nature of the conversation before being questioned about it. This failure is indicative of the government's intent to have the Witness make a statement that the government could claim was perjurious.

The court finds that the manner of questioning and the tactics of the government evince an attempt to encourage the Witness to give statements which it could later claim were perjurious.

It is an abuse of the grand jury process either to attempt to gather perjurious statements to secure an indictment for perjury, *E.g. Gershman "The Perjury Trap,"* 192 U.Pa.L. Rev. 624 (1981) (hereinafter "Gershman"), or

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had been in charge of the case for the government up until and including the day before the hearing at which time he had faxed a letter to Mr. Stark. In this letter, McCormick refused to provide for use at the hearing, the text of the grand jury testimony and the text of the taped conversation so that they could be compared.

to use the grand jury to "coax a witness into the commission of perjury." *Bursey v. United States*, 466 F.2d 1059, 1080 nt. 10 (9th Cir. 1972).[5] *Gershman* summarizes the three elements of a perjury trap, all of which the court finds exist in the present case.

The first element of a perjury trap is that a prosecutor has collected substantial proof of the activity that will be the subject of questioning prior to requiring the witness' attendance at the grand jury. In the case before the court, the government had an extensive investigation involving over four years, including electronic surveillance. Clearly the first prong of a perjury trap exists in the case before the court.

The second element requires that there is no other manner in which to secure an indictment of the witness. In the case before the court, the government never alleged that the Witness was in any way involved in illegal activity. To the contrary, the government continually assured the Witness that he was not the target of the investigation. In addition, the Witness had been granted immunity, thus precluding the use of his statements and making any future criminal prosecution extremely difficult. Thus the second prong of the perjury trap is met.

The third prong involves unusual tactics by the prosecutors. In this case the court notes that the government never oriented the Witness as to the date, the location, or the person involved with the tape recording that is the subject of the grand jury questioning. Instead the government, through the interview prior to the grand jury

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[5] See also, *Brown v. U.S.*, 245 F.2d 549, 554 (8th Cir. 1957).

appearance, knew the statements that the Witness would give to the grand jury and did nothing to advise the Witness that the government believed these statements were not truthful. Thus the government was content to continue securing what it believed to be perjured testimony until such time as the Witness left the grand jury room to confer with his attorney. The government's interest in securing the Witness' cooperation for future investigation and the government's refusal to accept any answer on the part of the Witness short of recantation of prior testimony and the giving of testimony consistent with the government's theory of its investigation, are all factors contributing to unusual tactics by the prosecution.

The court also notes that the Witness is an 84 year old man who has been treated for a major depressive episode and is currently under a doctor's care for mental infirmities.

The court finds, therefore, that the subpoena directed to the Witness constitutes an abuse of the grand jury process.

Accordingly, it is hereby:

ORDERED and ADJUDGED that Benjamin Husick's Motion to Quash Grand Jury Subpoena is hereby GRANTED and the subpoena is QUASHED.

DONE AND ORDERED in Chambers at Fort Lauderdale, Florida, this 15th day of July, 1997.

/s/ Jose A. Gonzalez, Jr.
JOSE A. GONZALEZ, JR.
UNITED STATES
DISTRICT JUDGE

cc: All Counsel